THE DISTRICT COURT FOR THE STATE OF ALASKA
FOR THE FOURTH JUDICIAL DISTRICT IN TOK

STATE OF ALASKA,)
Plaintiff,)
)
vs.)
)
JEFFERY D. SCOTT,)
Defendant.)
)

Case No. 4TO-S92-83 CR

REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS DUE TO LACK OF STATE JURISDICTION

(Filed Sep. 23, 1992)

This document and its attachments do not contain information that is confidential under A.S. 12.61.110 or the name of a victim of a crime listed in A.S. 12.61.140.

COMES NOW the defendant, Jeffery D. Scott, by and through his attorney, Sheri L. Donaldson, and hereby enters his reply to the plaintiff's opposition to the defendant's motion to dismiss due to lack of State jurisdiction. This reply is supported by the attached memorandum.

DATED at Fairbanks, Alaska this 21st day of September, 1992.

TANANA CHIEFS CONFERENCE, INC.

/s/ Sheri L. Donaldson
Sheri L. Donaldson
Attorney for Mr. Scott

This is to certify that a copy of this Reply was hand-delivered on September 21st, 1992 to the following parties or attorneys of record: District Attorney's office.

/s/ Vera Wells 9-21-92
Date

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT TOK

STATE OF ALASKA,)
Plaintiff,)
)
vs.)
)
JEFFERY D. SCOTT,)
Defendant.)
)

Case No. 4TO-S92-83 CR

MEMORANDUM IN SUPPORT OF REPLY

(Filed Sep. 23, 1992)

The defendant moves for a dismissal of the charge for the reason that the State has no jurisdiction to prosecute this State regulation in Indian Country.

The State instead claims that P.L. 280 gives the State "criminal" jurisdiction in Indian Country, and cites 18 U.S.C.A. Section 1162 for authority. The defendant will now respond to the State's opposition, and asks the Court's indulgence in this necessarily lengthy reply.

"Indian Country" is defined in 18 U.S.C. Section 1151(b) as all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state. The application of the term "Indian Country" does not depend upon the manner in which the land was acquired, but rather on whether such land has been set apart for the use and occupancy of Indians. *State v. Youngbear,* 229 N.W.2d 728, 732 (Iowa 1975). *See also United States v. McGowan,* 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed.410; *United States v. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913); *People of South Naknek v. Bristol Bay Bor.,* 466 F. Supp. 870 (D. Ak 1979). An Indian group is a "tribe or band" with a "duly recognized" governing body if: (1) whether the Indian group has a governing body approved by the Secretary of the Interior under 25 U.S.C. Section 476, or (2) whether the Indian group is a group or village listed as a native village in the *Alaska Native Claims Settlement Act,* 43 U.S.C. Section 1610(b)(1). *Native Village of Venetie v. Alaska,* 944 F.2d 548, 551 (9th Cir. 1991). The Native Village of Northway satisfies the second criteria in that it is listed as a Native village subject to the Act under the Alaska Native Claims Settlement Act. The Native Village of Northway has also enacted its own Constitution and has a fully functioning Tribal Court.

The State is mistaken in applying a criminal jurisdiction model because it is clear that 28 U.S.C. Section 1360(a) (governing a State's *civil* jurisdiction in Indian Country) instead controls. In *Bryan v. Itasca County,* 426 U.S 373, 48 L.Ed.2d 710, 723, 96 S.Ct. 2102 (1976) the Court analyzed P.L. 280 civil jurisdiction and found that

28 U.S.C. was not a congressional grant of power to tax reservation Indians. In *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 76 L.Ed.2d 611, 627, 103 S.Ct. 2378 (1983), the Court found that the Mescalero Apache Tribe lawfully exercised substantial control over the lands and resources of its reservation, including its wildlife. Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. *Id.* at 76 L.Ed.2d 619. Because of their sovereign status, tribes and their reservation lands are insulated in some respects by a historic immunity from state and local control. *Id.* The sovereignty retained by tribes includes the power of regulating their internal and social relations. *Id.; See also United States v. Kagama,* 118 U.S. 375, 381-382, 30 L.Ed. 228, 6 S.Ct. 1109 (1886); *United States v. Wheeler,* 435 U.S. 313, 322, 55 L.Ed. 2d 303, 98 S.Ct. 1079 (1978). Tribes in general retain this authority to regulate the use of its resources by members as well as nonmembers. *Mescalero Id.* at L.Ed.2d 622; *See also Montana v. United States,* 450 U.S. 544, 558-559, 67 L.Ed.2d 493, 510-511, 101 S.Ct. 1245 (1981) (the tribe may prohibit nonmembers from hunting and fishing on land belonging to the tribe; a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe); *United States v. Winans,* 198 U.S. 371, 381, 49 L.Ed. 1089, 25 S.Ct. 662 (1905) (hunting and fishing were not much less necessary to the existence of the Indians than the atmosphere they breathed).

The Supreme Court in *Mescalero* also stated that this aspect of tribal sovereignty has been expressly confirmed by numerous federal statutes. *Id.* at L.Ed.2d 623. P.L. 280 specifically confirms the power of tribes to regulate on-reservation hunting and fishing. *Id.* This authority is afforded the protection of the federal criminal law by 18 U.S.C. Section 1165 which makes it a violation of federal law to enter Indian land to hunt, trap, or fish without the consent of the tribe. *Id.* The tribe's authority to regulate hunting and fishing preempts state jurisdiction. *Id.*

In *California v. Cabazon Band of Indians*, 480 U.S. 202, 94 L.Ed.2d 244, 254, 107 S.Ct. 1083 (1987), the Court stated that when a State seeks to enforce a law within an Indian reservation under the authority of P.L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

The Court in *Cabazon* employed a new test that originated in *Barona Group of the Capitan*, 694 F.2d 1185 (1982) cert. den., 461 U.S. 929, 77 L.Ed.2d 301, 103 S.Ct. 2091 (1983). *Id.* at L.Ed.2d 255. In *Barona*, the Court drew a distinction between state "criminal/prohibitory" laws and state "civil/regulatory" laws: if the intent of a state law is generally to prohibit certain conduct, if falls within P.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct, subject to regulation, it must be classified as civil/regulatory and P.L. 280 does not authorize its enforcement on an Indian reservation. *Id.*

This rule was employed in *Oneida Tribe of Indians of Wisconsin v. State*, 518 F.Supp. 712, 719 (W.D. Wis. 1981) where the Court found that Wisconsin's bingo laws were civil-regulatory, not enforceable by the State in Indian Country. When Congress conferred jurisdiction on the State to enforce its criminal laws on the Oneida Reservation, Congress intended to limit the exercise of that jurisdiction to enforcement of laws generally prohibiting activities that the state determined are too dangerous, unhealthy, or otherwise detrimental to the well-being of the state's citizens. *Id.* at 720. Congress did not intend to allow states to use licensing requirements in an attempt to create jurisdiction to enforce otherwise civil regulations on Indian reservations. *Id.; See also Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981) (Florida bingo statute is "civil/regulatory", rather than "criminal/prohibitory" in nature); *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980); *United States v. County of Humboldt*, 615 F.2d 1280 (9th Cir. 1980); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975).

In *U.S. v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977) the Ninth Circuit Court of Appeals examined the State's fireworks law, and found that it was prohibitory, rather than regulatory. The Court stated:

> "The possession of fireworks is not the same situation encountered *in other regulatory schemes such as hunting or fishing, where a person who wants to hunt or fish merely has to pay a fee and obtain a license. The purpose of such statutes is to regulate the described conduct and to generate revenues.* In contrast, the purpose of the fireworks laws is not to generate income, but rather to prohibit their general use and possession in a

legitimate effort to promote the safety and health of all citizens."

Id. at 557 F.2d 1364 (Emphasis added).

In *Harrison v. State,* 791 P.2d 359, 362, footnote 4, (Alaska App. 1990) the Court stated that Alaska statutes which govern ownership and operation of motor vehicles are regulatory, and were not within the grant of criminal jurisdiction contained in 18 U.S.C. 1162. Consequently, the statutes violated by the defendant are not within the grant of criminal jurisdiction contained in P.L. 280. *Id.*

The Court in *Native Village of Venetie v. Alaska,* 944 F.2d 548, 60 (9th Cir. 1991) recently analyzed P.L. 280. It found that P.L. 280 was designed not to supplant tribal institutions, but to supplement them. *Id.* P.L. 280 is not a divestiture statute. *Id.; See also California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207-212, 107 S.Ct. 1083, 1087-90 (1987); *Walker v. Rushing,* 898 F.2d 672, 675 (8th Cir. 1990) (P.L. 280 did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law; nothing in the working of P.L. 280 or its legislative history precludes concurrent jurisdiction).

It is clear that a jurisdictional presumption exists in federal Indian law that a state has no jurisdiction over Indians on a reservation unless it has been explicitly granted that jurisdiction. *People of South Naknek v. Bristol Bay Borough,* 466 F.Supp. 870, 876 (D.Ak 1979). Indian affairs are subject to state law only to the extent that Congress explicitly so provides. *Ollestead v. Native Village of Tyonek,* 560 P.2d 31, 34 (Alaska 1977).

Therefore, it is clear that any jurisdiction that Alaska may have over Northway "Indian Country" under P.L. 280 would be civil, not criminal, for hunting and fishing are generally allowed, not prohibited, within the State and is regulated by Alaska law. Therefore, the State of Alaska is not allowed to enforce its civil regulations in Northway Indian Country, especially in the face of Indian custom or practice that may dictate a different outcome than under Alaska State law. The Tribe's authority to regulate, or not regulate, hunting on its Indian Country preempts state jurisdiction.

The Native Village of Northway should be able to formulate whatever hunting restrictions it wants on its own land under its inherent powers of tribal sovereignty. It does not need the eternally-patronizing State of Alaska to tell them how, when, or who can hunt on their own Indian land. Mr. Scott's status as a non-native has nothing to do with the issue discussed in this motion, whether the State has jurisdiction to prosecute this offense which occurred in Indian Country. Prior cited caselaw in this motion shows that a tribe's jurisdiction concerning hunting and fishing regulations extends to non-members as well as tribal members. The State claims that there are no tribes in Alaska other than the Metlakatlans, but doesn't state exactly what specific federal statute extinguished and terminated all other Indian tribes in Alaska. The powers of Indian tribes are inherent powers of a limited sovereignty which have never been extinguished. *U.S. v. Wheeler*, 435 U.S. 313, 322-23, 98 S.Ct. 1079, 1085-86, 55 L.Ed.2d 303, 312-13 (1978).

The appropriate rules of statutory construction in federal Indian law are different than those usually

applied under State law. Statutes instead are to be construed liberally in favor of the Indians; ambiguous provisions are to be interpreted to the Indians' benefit. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985).

It is clear that federal Courts have moved away from a termination/assimilation interpretation of federal statutes, toward a reaffirmation of inherent tribal sovereignty. Favorable rules of judicial construction apply to Indian legislation because "Indians stand in a special relation to the federal government from which the states are excluded, unless Congress has manifested a clear purpose to terminate immunity and allow states to treat Indians as part of the general community." *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 613-14 (1943).

This principle applies equally to ANSCA. *See Hackla v. Atxam Corp.*, 753 P.2d 1144, 1147 (Alaska 1988) (ambiguities in ANCSA, as in other federal statutes for the benefit of the Indians, are to be construed in favor of the Indians). Tribal status and governmental powers survive the termination of a reservation unless clearly and unequivocally extinguished by Congress. *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 353 (1941); *Decoteau v. District County Court*, 420 U.S. 425, 442-44 (1975); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Kimball v. Callahan*, 590 F.2d 768, 776-77 (9th Cir., cert. den. 444 U.S. 826 (1979). Federal courts have ruled that this principle applies equally to ANCSA villages. *See Chilkat Indian Village v. Johnson*, No. J84-024 Civ. (D. Alaska, Oct. 9, 1990) (if Chilkat had governmental power under its status as a reservation ANCSA did nothing to

extinguish those powers); *Native Village of Tyonek v. Puckett*, 890 F.2d 1054 (9th Cir. 1989) (ANCSA did not abrogate Tyonek's tribal sovereign immunity); *Blatchford v. Native Village of Noatak and Circle Village*, ___ U.S. ___, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) (ANCSA constitutes Congressional recognition of Native Villages as Indian tribes). The federal government's special relationship with Alaska Natives to facilitate the goals of self-determination is evidenced by the fact that ANCSA villages have been recognized in virtually all modern Indian legislation enacted since 1971. *See* 25 U.S.C. Section 450a(b), 450b(e); 25 U.S.C. Section 1901 et. seq.; 25 U.S.C. Section 1451, 1452(c); 31 U.S.C. Section 7102; 26 U.S.C. Section 7701(40), 7871.

Although all Indian reserves except one in Alaska were revoked under ANCSA, no attempt was made under the statute to limit the authority of the Native villages, either the many villages that had organized pursuant to the IRA or those that had governed according to their inherent tribal authority. Getches & Wilkinson, *Federal Indian Law*, pg. 778 (West 1986).

In the absence of a clear Congressional intent to terminate aboriginal hunting rights in Northway Indian Country, it is clear that ANSCA did not extinguish these hunting rights.

The State cites *Organized Village of Kake v. Egan*, 369 U.S. 60, 7 L.Ed. 2d 573, 82 S.Ct. 562 (1962) to support its claim that there is no Indian Country in Alaska except the Metlakatla reservation. Instead, in that case, the Court merely found that P.L. 280 disclaims the intention to permit State to interfere with federally granted fishing

privileges or uses of property, and that the State has power to regulate off-reservation fishing by Indians. *Id.* at 583. In another case the State cites, *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 7 L.Ed.2d 562, 571, 82 S.Ct. 552 (1962), the United States Supreme Court stated that Section Four of the Alaska Statehood Act, as amended by 73 Stat. 141, required Alaska to disclaim all right and title to any United States property not granted her by the statute, and also "to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives. Legislative history of the Act makes clear that the transfer of jurisdiction over fishing was subject to rights reserved in Section Four. *Id.* The Court stated that this section does not protect only "recognized" Indian rights – those the taking of which would be compensable by the United States. *Id.* at L.Ed.2d 572. The aim of Congress was to preserve the status quo as to a broader class of "right", including, in the case of land, mere possession or occupancy. *Id.* The Act clearly preserves federal authority over the reservation. *Id.*

In *Native Village of Stevens v. A.M.P.*, 757 P. 2d 32, 40 (Alaska 1988) the Court inexplicably finds that the power of local government (tribal sovereignty) cannot be extended to the village because it is not a "reservation". Clearly, the Court's conclusion flies in the face of basic federal Indian law which accords tribal sovereign powers to an Indian tribe in Indian Country, and which states that these powers are not extinguished or terminated unless there is a clear Congressional intent to do so. A reservation is clearly only one type of "Indian Country."

In issues of federal law, such as this, lower Alaska courts are not bound by Alaska Supreme Court decisions, but are bound to follow United States Supreme Court decisions. At this point, it is obvious that Alaska courts are taking an adverse political stance against tribal sovereign rights. At least one Superior Court Judge and Chief Justice, though, are in agreement about tribal self-government powers of Native Villages (*See Nenana Fuel Co. Inc. v. Venetie*, No. 3869 (Alaska July 24, 1992).

DATED at Fairbanks, Alaska this 21st day of September, 1992.

/s/ Sheri L. Donaldson
Sheri L. Donaldson
Attorney for Mr. Scott

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT TOK

STATE OF ALASKA,)
Plaintiff,)
)
v.)
)
JEFFERY D. SCOTT,)
Defendant.)
)

Case No. 4TO-S92-83 CR

ORDER

The defendant having filed his Motion to Dismiss Based on Lack of State Jurisdiction and the Court being fully advised in the premises; it is hereby ordered that the motion is GRANTED.

DATED this ___ day of ___, 1992.

DISTRICT COURT JUDGE